

Korakyat Plantations Sdn Bhd (in liquidation) v Tan Siew Ee & Ors A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-580 OF 2003 B

MOHD GHAZALI, MOKHTAR SIDIN JJCA AND ABDUL WAHAB PATAIL J
23 APRIL 2005

Companies and Corporations — Arrangement, scheme of — Court approval — Application to amend scheme of arrangement — Applicants excluded from scheme of arrangement — Applicants bona fide purchasers of property developed by insolvent developer — Applicants executed valid sale and purchase agreements and had given valuable consideration — Whether applicants should be excluded from scheme of arrangement — Whether applicants' sale and purchase transactions void — Whether applicants' property should be subject to scheme of arrangement — Bankruptcy Act 1967, s 52 & Companies Act 1965, s 293 C
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Companies and Corporations — Winding up — Undue preference — Whether onus upon liquidators to show transactions executed in bad faith and without valuable consideration — Bankruptcy Act 1967, s 52 & Companies Act 1965, s 293 E

The property-developer appellant obtained a bridging loan from Alliance Bank Malaysia Berhad ('ABMB') for a certain property-development project ('the project'). Pursuant to such loan facility the appellant granted ABMB a debenture, creating a fixed and floating charge over its assets. The appellant defaulted on the facility. It was wound-up by ABMB. The liquidators ascertained that the appellant's unsecured creditors included purchasers and the project's main contractor. The liquidators proposed a scheme of arrangement pursuant to s 176 of the Companies Act 1965. Part of the scheme involved the transfer of some 26 units ('the settlement units') from the project to ABMB as full and final settlement of ABMB's claim. At the proposed scheme of arrangement meeting, more than three-fourths in value of the creditors present and voting at the meeting agreed to the proposed scheme. The respondents were the purchasers of some 20 units that were part of the settlement units transfer to ABMB. They were classified as 'disputed purchasers' by the liquidators and excluded from the scheme. The appellants subsequently petitioned the High Court to sanction the scheme of arrangement. The respondents were given leave to intervene. They filed various applications inter alia to amend the scheme of arrangement so as to exclude their 20 units from the settlement units. The proceedings were all heard together. Evidence put before the High Court included receipts issued by the appellant acknowledging that the respondents had paid 10% of the purchase price for each unit purchased; and letters of undertaking by the appellant unconditionally agreeing to transfer units free of any encumbrances as a total set off against loans taken from the respondents. The High Court sanctioned the appellant's petition subject to the respondents' 20 units being excluded from the F
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A scheme of arrangement. The respondents had their applications allowed with costs. The appellant appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

- B (1) The respondents had proved that they purchased the 20 lots in issue and had given valuable consideration. The respondents produced receipts issued by the appellant to show that they paid the 10% deposit required upon execution of the respective agreements. The 'letters of undertaking' issued by the appellant clearly spelt out that the appellant unconditionally agreed that it would
- C transfer/ assign the units of property free of any and whatsoever encumbrances/ or claim by it as a total set off against the loans taken from the respondents. This was tantamount to an admission by the appellant that it had received valuable consideration from the respondents concerned (see para 33).
- D (2) The High Court judge did not err when he ordered the liquidators to exclude the 20 units in issue from the list of 'settlement units' intended for transfer to ABMB. The respondents had given valuable consideration and it would be unfair of the liquidators to exclude the respondents from the proposed scheme. The respondents had acted in good faith in purchasing the respective units from the appellant and hence were bona fide purchasers. Section 52 of the
- E Bankruptcy Act 1967 and s 293 of the Companies Act 1965 were not applicable on the facts in the instant case. The sale and purchase agreements entered into between the respondents as purchasers and the appellant as vendor were valid transactions (see paras 34 and 35); *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 204 followed.
- F (3) The liquidators had not shown that the respondents were not purchasers in good faith or that the transactions were entered into without valuable consideration on the part of the respondents as purchasers. The liquidators simply could not confiscate the respondents' rights as unsecured creditors. The burden of proof as required by s 52 of the Bankruptcy Act 1967 rested with the liquidators. The liquidators failed to prove that the transactions were
- G invalid (see para 36).

[Bahasa Malaysia summary]

- H Perayu yang merupakan pemaju hartanah telah memperolehi pinjaman bridging daripada Alliance Bank Malaysia Bhd ('ABMB') bagi sebuah projek pembangunan hartanah ('projek tersebut'). Berikutan kemudahan pinjaman tersebut, perayu memberi ABMB satu debentur, yang mewujudkan cagaran tetap dan terapung ke atas hartanya. Perayu kemudiannya tidak membuat bayaran. Ia telah digulung oleh ABMB. Penyelesai telah menentukan bahawa pemiutang-pemiutang tak bercagar
- I bagi perayu adalah termasuk pembeli dan kontraktor utama projek tersebut. Penyelesai telah mencadangkan satu skim pengurusan menurut s 176 Akta Syarikat 1965. Sebahagian daripada skim tersebut melibatkan pemindahan 26 unit ('unit penyelesaian tersebut') dalam projek itu kepada ABMB sebagai penyelesaian penuh dan terakhir bagi tuntutan ABMB. Pada mesyuarat skim pengurusan yang dicadangkan itu, lebih daripada tiga per empat pemiutang yang hadir dan mengundi

dalam mesyuarat itu bersetuju dengan skim yang dicadangkan. Responden-responden merupakan pembeli 20 unit yang merupakan sebahagian daripada unit-unit penyelesaian yang dipindahkan kepada AMSB. Mereka dikelaskan sebagai 'pembeli bertikai' oleh penyelesaian dan tidak dimasukkan dalam skim tersebut. Perayu kemudiannya telah membuat petisyen ke Mahkamah Tinggi untuk mendapatkan sanksi bagi skim pengurusan itu. Responden telah diberi kebenaran untuk campur tangan. Mereka telah memfailkan pelbagai permohonan inter alia untuk meminda skim pengurusan tersebut untuk mengecualikan 20 unit itu daripada unit penyelesaian. Kesemua prosiding didengar bersama. Keterangan yang dikemukakan di mahkamah termasuk resit-resit yang dikeluarkan oleh perayu yang mengakui bahawa responden-responden telah membayar 10% daripada harga belian bagi setiap unit yang dibeli; surat akujanji oleh perayu yang bersetuju tanpa syarat untuk memindahkan unit bebas daripada bebanan sebagai tolakan penuh terhadap pinjaman yang diambil daripada responden-responden. Mahkamah Tinggi telah memberi sanksi kepada petisyen perayu tertakluk kepada syarat 20 unit responden dikecualikan daripada skim pengurusan. Rayuan responden dibenarkan dengan kos. Perayu membuat rayuan ke Mahkamah Rayuan.

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Diputuskan, menolak rayuan dengan kos:

- (1) Responden-responden telah membuktikan bahawa mereka telah membeli 20 lot tersebut dan telah memberikan balasan berharga. Responden telah mengemukakan resit yang dikeluarkan oleh perayu untuk menunjukkan bahawa mereka telah membayar deposit 10% yang diperlukan apabila menandatangani perjanjian masing-masing. Surat akujanji yang dikeluarkan oleh perayu dengan jelasnya menyebut bahawa perayu tanpa bersyarat telah bersetuju untuk menyerahkan unit harta itu bebas daripada sebarang bebanan/ atau tuntutan sebagai tolakan penuh terhadap pinjaman yang diambil daripada responden-responden. Ini adalah merupakan satu pengakuan daripada perayu bahawa ia telah menerima balasan berharga daripada responden-responden yang berkenaan (lihat perenggan 33).
- (2) Hakim Mahkamah Tinggi tidak salah apabila memberi arahan kepada penyelesaian untuk mengecualikan 20 unit berkenaan daripada senarai 'unit penyelesaian' untuk dipindahkan kepada ABMB. Responden telah memberikan balasan berharga dan adalah tidak adil untuk penyelesaian mengecualikan responden-responden daripada skim yang dicadangkan itu. Responden-responden telah bertindak dengan suci hati semasa membeli unit masing-masing daripada perayu oleh itu adalah merupakan pembeli bona fide. Seksyen 52 Akta Kebankrapan 1967 dan s 293 Akta Syarikat 1965 adalah tidak terpakai ke atas fakta-fakta dalam kes ini. Perjanjian jual beli di antara pembeli dan perayu sebagai penjual adalah transaksi yang sah (lihat perenggan 34 dan 35); *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 204 diikuti.
- (3) Penyelesaian tidak menunjukkan bahawa responden-responden bukan pembeli dengan suci hati atau transaksi tersebut dimasuki tanpa balasan berharga daripada responden sebagai pembeli. penyelesaian tidak boleh merampas hak responden sebagai pemiutang tak bercagar. Beban pembuktian seperti yang

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- A dikehendaki dalam s 52 Akta Kebankrapan 1967 terletak kepada penyelesaian. penyelesaian gagal untuk membuktikan bahawa transaksi tersebut adalah tidak sah (lihat perenggan 36).]

Notes

- B For cases on court approval, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 25–28.
For a case on undue preference, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1354.

Cases referred to

- C *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 204 (folld)

Legislation referred to

- Bankruptcy Act 1967 s 52
Companies Act 1965 s 20(1), 176, 236(3), 279, 293, 305(1)
D Companies (Winding-Up) Rules 1972 r 7
Evidence Act 1950 s 91

- Appeal from:** Originating Petition No D5–26–15 of 2003, Winding up Petition No D3–28–105 of 2000, Notice of Motion No D8–25–8 of 2003, Notice of Motion No D8–25–9 of 2003, Notice of Motion No D8–25–10 of 2003 (High Court, Kuala Lumpur)

- E *Michael KT Chow (Sylvia Cotter with him) (Logan Sabapathy & Co) for the appellant. Balasekaran Suppiah (Yae Khoon Chin and Wan Amir with him) (Yae, Lau & Partners) for the first and second respondents.*
F *Syed Faisal (Mohd Yamin with him) (Syed Faisal Kumar & Co) for the third to ninth respondents.*

Mohd Ghazali JCA (delivering judgment of the court):

- G [1] These five matters were heard together in the court below. They are as follows:
(1) Winding-up Petition No D3–28–105 of 2000;
(2) Originating Petition No D3(D5)–26–15 of 2003;
H (3) Notice of Motion No D8–25–8 of 2003;
(4) Notice of Motion No D8–25–9 of 2003;
(5) Notice of Motion No D8–25–10 of 2003.
I [2] The chronology of events in these proceedings are as follows:
(1) on 3 February 2000, a winding-up petition (Winding-up Petition No D3–28–105 of 2000) was presented against the appellant, Korakyat Plantations Sdn Bhd by Alliance Bank Malaysia Berhad ('ABMB') and on 10 May 2000, a winding up order was granted against the appellant and liquidators were appointed;

- (2) on 29 October 2002, on the application of the liquidators, the court granted an order for the holding of a meeting of a proposed scheme of arrangement between the appellant and its creditors pursuant to the provisions of s 176 of the Companies Act 1965 ('the Act'); A
- (3) the meeting was held on 20 December 2002 and a majority in number representing more than three-fourths in value of the creditors present and voting at the meeting agreed to the proposed scheme of arrangement (hereafter referred to as 'the proposed scheme'); B
- (4) on 19 February 2003 the liquidators filed a petition (Originating Petition No D3(D5)-26-15 of 2003) to obtain the approval of the court to the proposed scheme (hereafter referred to as 'the sanction proceedings'). C
- [3] The respondents to this appeal were subsequently given leave to intervene in the sanction proceedings. D
- [4] On 10 March 2003 the third and fourth respondents filed an application (Notice of Motion No D8-25-8 of 2003) made pursuant to s 279 of the Act and r 7 of the Companies (Winding-Up) Rules 1972 to move the court for, inter alia, the following orders: E
- (1) that the proposed scheme be amended as follows:
- (i) that the words 'Settlement Units' and its definition as appearing in the explanatory statement in Part B to the proposed scheme be deleted; and
- (ii) that lot PTM 13 appearing in Schedule B to the proposed scheme entitled 'Particulars of Settlement Units' be deleted as a 'Settlement Unit'; F
- (2) that the liquidators be restrained from entering into any dealing with lot PTM 13.
- [5] The words 'Settlement Units', defined in Part B read as follows: G
- The 26 or such units from the Project which the Company may with the agreement of ABMB select, and, which shall have a cumulative notional value of RM6,809,000, to be transferred to ABMB as full and final settlement of ABMB's claim. The particulars of the said 26 units are contained in Schedule B to the Explanatory Statement. H
- [6] On the same date, ie, 10 March 2003 the fifth and sixth respondents filed a similar application (Notice of Motion No D8-25-9 of 2003) in relation to lot PTM 69 appearing in Schedule B to the proposed scheme be deleted as a 'Settlement Unit'. Simultaneously the seventh, eighth and ninth respondents also filed a similar application (Notice of Motion No D8-25-10 of 2003) in relation to 15 of the lots appearing in Schedule B to the proposed scheme, namely, lots PT 155, PT 196, PT 223, PT 238, PT 239, PTI 1, PTI 2, PB 27, PB 28, PTM 60, PTM 61, PTM 62, PTM 66, PTM 67 and PTM 68 be deleted as 'Settlement Units'. I

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[7] On 12 March 2003, the first and second respondents, in relation to lots PTM 36, PTM 38 and PTM 39 appearing in Schedule B to the proposed scheme filed their respective notices of motion (encls 29 and 32) and prayed for, inter alia, the following orders:

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- (1) leave to intervene in these proceedings;
- (2) leave to commence proceedings against the liquidators pursuant to ss 236(3) and 305(1) of the Act; and
- (3) leave to vary or modify the proposed scheme pursuant to s 279 of the Act.

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[8] The total of 20 lots described above forms the subject matter of these proceedings.

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[9] The facts showed that the appellant was incorporated as an investment holding company on 12 September 1985 with a paid up capital of RM1 million. At all material times the appellant was involved in the development of a project which is a mixed commercial and light industrial development consisting of 478 lots of factory units. The project is located on several pieces of land and form the sole asset of the appellant. Of the 478 lots, 407 lots have been disposed of to purchasers pursuant to sale and purchase agreements entered into with the appellant. Of the remaining 71 lots, 68 lots are the subject of sale and purchase agreements and three lots remain unsold.

E**F**

[10] It is the liquidator's position that the 20 lots in issue are the subject of sale and purchase agreements the status and validity of which are uncertain having regard to the provisions of s 293 of the Act. Section 293 entitled 'Undue preference' reads:

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- (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.

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- (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —
 - (a) in the case of a winding up by the Court —
 - (i) the date of the presentation of the petition; or
 - (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier, and

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- (b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.
- (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

[11] In relation to the implementation of the project the appellant obtained a bridging loan from ABMB. Pursuant to such a facility, the appellant granted ABMB a debenture creating a fixed and floating charge over its assets. Sometime in 1998 the appellant defaulted on the said facility with the result that ABMB appointed a receiver and manager pursuant to the said debenture. Subsequently, the appellant was wound up on 10 May 2000 and the liquidators were consequently appointed. At the date of the winding up, the amount claimed by ABMB was RM9,993,790.08.

[12] The liquidators have ascertained that apart from the secured debt of ABMB, the principal creditors of the appellant are the purchasers whom the liquidators have classified as unsecured creditors together with other unsecured creditors which comprise essentially the main contractor for the project.

[13] The liquidators have formulated the proposed scheme to allow the completion of the project in order that the participating purchasers may obtain the benefits of their previous sale and purchase agreements with the appellant and also to achieve a more advantageous distribution for the general body of creditors for an orderly winding down of the appellant's affairs. ABMB had on 15 August 2002 consented to the proposed scheme.

[14] The court convened meeting ('the said meeting') was held on 20 December 2002. Although the total number of participants at the said meeting was 407, 60 of them were not accepted as purchasers having regard to s 293 of the Act. The appellant and the purchasers achieved the statutory approvals at the said meeting. The appellant subsequently applied to court and prayed for, inter alia, that the proposed scheme may be sanctioned by the court so as to be binding upon the appellant and the purchasers, ie, the sanction proceedings. As stated earlier, the respondents were given leave to intervene in the sanction proceedings.

[15] The only issue raised by the respondents was whether the liquidators were correct in classifying them as 'disputed purchasers' as defined in the proposed scheme with the result that they were excluded from the same. The liquidators' position is that the respondents have been treated as 'disputed purchasers' because:

- (1) each of their alleged sale and purchase agreements were entered into to purportedly set off debts allegedly due from the appellant to their goodselves when, amongst other things, no proof whatsoever has been presented to support the existence of such alleged debts;
- (2) alternatively, even if such debts did exist, such set off arrangement would breach the provisions of s 293 of the Act read with s 52 of the Bankruptcy Act 1967 which would render the respective sale and purchase agreements void.

[16] Section 52 of the Bankruptcy Act 1967 entitled 'Avoidance of voluntary settlement' reads:

- (1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or incumbrancer in good faith

- A** and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Official Assignee, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Official Assignee, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.
- B**
- C** (2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the Official Assignee.
- D**
- E** [17] The learned judge found that the respondents are bona fide purchasers for value and hence ruled that the liquidators were wrong in fact and in law in classifying each of the respondents as disputed purchasers as defined in and for the purposes of the proposed scheme. He found that the respondents had proved that they entered into valid sale and purchase agreements before the appellant was wound up. The learned judge also found a 'letter of undertaking' dated 12 July 1995 and issued by Tan Seng Chai, a director of the appellant to, inter alia, the first and second respondents supported their contention. That letter read:
- F** KORAKYAT PLANTATIONS SDN BHD
(Company No: 144726-A)
-
- G** Date: 12 July 1995
Tan Siew Yong
Tan Siew Lee
Tan Siew Ee
All of
No 416, 2 _ Miles
Jalan Ipoh
51200 Kuala Lumpur
- H** Dear Madam, Re: Contra of building units in Taman Perindustrian Subang Mewah in repayment of a loan taken from you.
- I** Contra Unit No: PTM 38, PTM 39, PTM 36
We hereby confirm that we have earlier taken a friendly loan from Tamra Business Machines Sdn Bhd in the sum of RM432,000.00 (Ringgit Malaysia Four Hundred and Twenty Three Thousand Only) to enable us to meet substantial preliminary expenses connected with the above project.

As agreed, we will transfer/assign the above units of property free of any and whatsoever encumbrances /or claim by us, as a total set-off against the loan taken from you.

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As evidence of your entitlement to the above properties, you will execute and be bound by the terms and conditions of the standard sale and purchase agreement, applicable for the above project Save and Except that upon your execution, the purchase price shall be deemed fully paid.

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Yours faithfully,

(Sign)

Tan Seng Chai

Director

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[18] The learned judge was of the view that since the respondents are bona fide purchasers for value, s 293 of the Act and s 52 of the Bankruptcy Act 1967 are not applicable under the circumstances.

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[19] The evidence also showed that a similar 'letter of undertaking' was issued to the seventh, eighth and ninth respondents. That letter read:

KORAKYAT PLANTATIONS SDN BHD

(Company No: 144726-A)

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Date: 12 July 1995

Tan Seng Yong

(NRIC No: 4261085)

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Tan Seng Gee

(NRIC No: 56644514)

Koh Chong Kiaw

(NRIC No: 8158527)

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All of

No 11 & 11A,

Jalan Perisai,

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Taman Sri Tebrau,

80050 Johor Bahru,

Johor Darul Takzim

Dear Sirs,

I

Re: Contra of building units in Taman Perindustrian Subang Mewah in repayment of a loan taken from you.

Contra Unit No PB 27, PB 28, PT 155, PT 196, PT 223, PT 238, PT 329, PTM 60, PTM 61, PTM 62, PTM 66, PTM 67, PTM 68, PT 1, PT 2.

- A** We hereby confirm that we have taken a friendly loan from Mr Tan Seng Yong in the sum of RM1,180,000 (Ringgit Malaysia One Million One Hundred and Eighty Thousand Only) and from Mr Tan Seng Gee in the sum of RM 418,000.00 (Ringgit Malaysia Four Hundred and Eighteen Thousand Only) to enable us to meet substantial preliminary expenses connected with the above project.
- B** As agreed, we will transfer/assign the above units of property free of any and whatsoever encumbrances/or claim by us, as a total set-off against the loan taken from you.
- As evidence of your entitlement to the above properties, you will execute and be bound by the terms and conditions of the standard sale and purchase agreement applicable for the above project Save and Except that upon your execution, the purchase price shall be deemed fully paid.
- C** Yours faithfully,
(Sign)
Tan Seng Chai
Director
- D** [20] At the end of the day, the learned judge granted the orders prayed for by the respondents in their respective applications with costs and ordered that costs be paid out from the assets of the appellant. With regards to the sanction proceedings, the learned judge granted the sanction applied for in relation to the proposed scheme so as to be binding on the appellant and the purchasers subject to the orders granted in
- E** favour of the respondents, namely, that the 20 lots purchased by the respective respondents appearing in Schedule B to the proposed scheme as 'Settlement Units' be deleted. The appellant appealed.
- F** [21] We had on 26 July 2004 dismissed the appeal with costs and the following are our reasons for doing so.
- [22] Before us, learned counsel for the appellant contended that the principal issue is whether the learned judge was justified in reversing the decision made by the liquidators that each of the respondents was not a creditor for the purposes of the proposed scheme. He argued that the impugned decision of the liquidators must be viewed against the following legal principles which are equally applicable whether the liquidators were conducting a proof of debt exercise or in deciding whether a party should be included for the purposes of a scheme of arrangement, namely:
- G**
- H** (1) the main duties and obligations of any liquidator in the management of the affairs of an insolvent company is to identify the true creditors of the company;
- (2) the onus is on the creditors to prove their debts with sufficient evidence to the satisfaction of the liquidators;
- (3) in the event of a challenge to the decision of the liquidators in this regard, the creditors carry the additional burden to show that such a decision was wrong
- I** in the sense that the liquidators, given the material before them, could not have reached such a decision.
- [23] Counsel pointed out the evidence that was presented by the respondents before the court below was the very evidence that was submitted to the liquidators.

Each of the respondents produced purported sale and purchase agreements with the appellant in respect of the 20 lots in issue in these proceedings. The evidence they produced to show that they had paid the purchase price under each of the sale and purchase agreements were essentially as follows:

- (1) in respect of the first and second respondents and the seventh to the ninth respondents, respectively, the two said letters of undertaking dated 12 July 1995 (reproduced above) issued by the appellant before its liquidation, viz, 10 May 2000 agreeing to set off certain alleged debts from the appellant to these respondents by transferring the various lots in the said development to them;
- (2) purported supporting documents comprising, inter-alia, copies of cheques, payment vouchers and bank-in slips presented by the seventh to the ninth respondents which merely show payments to third parties;
- (3) in respect of the third to the sixth respondents, purported credit notes issued by the appellant which these respondents contend were towards the settlement of the purchase price of the various lots from the said development over which they claimed to have purchased.

[24] Counsel argued in the face of what can at best be described as ‘inconsistent documents’, the authenticity of which were in any event open to serious doubt given also the relationship between each of the respondents with a director of the appellant, namely, the said Tan Seng Chai, the respondents have clearly failed to show that they were creditors for the purposes of s 176 of the Act. Counsel further submitted even assuming that the appellant was indeed indebted to each of the respondents, the fact that each of the sale and purchase agreements was entered into to set off alleged antecedent debts within five years before the appellant was wound up would have rendered void such an arrangement given the provisions of s 52 of the Bankruptcy Act 1967 particularly when there was no evidence presented by the respondents, the burden of proof being upon them, that the appellant would have otherwise been in the position to pay all its debts without such set off arrangements.

[25] In his submission, learned counsel for the first and second respondents insisted that the first respondent at all material times is the purchaser of lots PTM 36 and PTM 38 and the second respondent, the purchaser of Lot PTM 39 from the appellant. He stressed that the learned judge ruled that the first and second respondents were bona fide purchasers and that lots PTM 36, PTM 38 and PTM 39 shall be excluded as ‘Settlement Units’ under the proposed scheme. He submitted that the learned judge has rightfully determined the issue that the first and second respondents were bona fide purchasers for value based upon the evidence before the court. Further, he has considered the surrounding circumstances of the case and deduced that the first and second respondents are in fact and in law bona fide purchasers for value.

[26] Counsel pointed out the notice of the court convened meeting dated 12 November 2002 was issued and served upon the first and second respondents by the liquidators. In relation to this he submitted that the liquidators have in fact invited or requested the first and second respondents to attend the meeting to exercise their rights to vote in favour of the proposed scheme. The first and second respondents had

- A** voted against the proposed scheme as it did not protect or safeguard their interest. He contended the liquidators by their conduct have in fact tacitly recognised that the first and second respondents are bona fide purchasers. They were conferred the right to vote and that would be a clear admission on the part of the liquidators that they are bona fide purchasers for value. Counsel then stressed the proposed scheme was
- B** unfair and unreasonable and does not protect and safeguard their interest as purchasers. He pointed out that the primary purpose of the proposed scheme was to protect the interest of ABMB's claim by way of transfer of the 'Settlement Units' plus a cash payment of RM184,790.00 as full and final settlement of all its claims and as far as it relates to them, it would tantamount to them virtually surrendering their
- C** interest in respect of lots PTM 36, PTM 38 and PTM 39 in favour of ABMB. Counsel submitted the liquidators are not acting in good faith but more in favour of ABMB. It is unwarranted and unreasonable on the part of the liquidators to classify them as disputed purchasers when the liquidators have knowledge of the existence of the sale and purchase agreements which were properly drawn up, executed, stamped and attested by solicitors and the appellant's 'letter of undertaking' dated 12 July
- D** 1995.

- [27] In relation to the liquidators' allegation of a 'relationship of sibling' between the said Tan Cheng Sai and the first and second respondents, counsel argued it is of no relevance to the issue before the court. The liquidators have no evidence to
- E** substantiate or justify that allegation. Furthermore, the said Teng Cheng Sai was not signatory to the sale and purchase agreements between the appellant and their good selves. The liquidators have not adduced evidence to show that the sale and purchase agreements contained more favourable terms than the sale and purchase agreements executed by purchasers whose lots do not appear in Schedule B to the
- F** proposed scheme as 'Settlement Units'.

- [28] Learned counsel for the third to the ninth respondents contended the liquidators had formulated a rehabilitation scheme with all intent and purpose to 'confiscate' the lots purchased by these respondents. He pointed out that on 22
- G** March 1995 the third to the ninth respondents as purchasers entered into 15 sale and purchase agreements with the appellant as vendor in relation to lots PT 155, PT 196, PT 223, PT 238, PT 239, PTI 1, PTI 2, PB 27, PB 28, PTM 60, PTM 61, PTM 62, PTM 66, PTM 67 and PTM 68, ie, exactly four years 10 months two days before the winding-up petition was presented against the appellant. At the material time
- H** when the sale and purchase agreements were entered into, there is no evidence to show that the appellant was insolvent or unable to meet its obligation. The sale and purchase agreements is evidence of the disposition of the appellant's property pursuant to contracts entered into between the parties. Thus, it is protected by s 91 of the Evidence Act 1950 and hence s 52 of the Bankruptcy Act 1967 could not be simply employed to invalidate the said sale and purchase agreements. Section 91 of
- I** the Evidence Act 1950 reads:

When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of

the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

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[29] Counsel then pointed out the appellant had neither disputed the sale and purchase agreements entered into nor raised any fact to cast doubt over its validity. Thus the learned judge was right in ruling that the same are valid transactions. The appellant had by virtue of the said 'letter of undertaking' confirmed with the third to the ninth respondents that in consideration of the loans advanced by them, the appellant shall set it off with the purchase price of the respective lots from the advance money which the respondents loaned. This set off arrangement had been unequivocally accepted by the appellant which was reduced into writing contained in that said letter. The acceptance is in accord to s 91 of Evidence Act 1950. That letter was also supported by the official receipts issued by the appellant bearing the same date. That letter and the receipts are coherent in that both reiterate and reinforce the set-off contra arrangement. The appellant also never disputed the fact that they had approached the respondents for advance monies in order to enable it to meet its preliminary project expenses.

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[30] The learned judge found that the third to the ninth respondents are bona fide purchasers for value and ruled that the liquidators were wrong in fact and in law in classifying the respondents as disputed purchasers for the purpose of the proposed scheme. He also found, based upon the material before him, the respondents have proved that they had entered into valid sale and purchase agreements before the appellant was wound up.

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[31] We cannot find anything erroneous with the findings of the learned judge. The evidence clearly showed that the respondents as purchasers entered into sale and purchase agreements with the appellant to purchase the lots, the subject of these proceedings, listed as 'Settlement Units' to the proposed scheme. The appellant issued receipts acknowledging that the respondents had paid 10% of the purchase price for each lot purchased. The appellant further undertook vide the said 'letters of undertaking' to transfer the lots identified therein to the respondents free from any encumbrances as a total set-off against loans taken from the respondents. The said 'letters of undertaking' further state that upon execution of the sale and purchase agreements the purchase price shall be deemed to have been paid. These letters were signed by the said Tan Seng Chai whom the liquidators alleged had a 'relationship of sibling' between the first and second respondents. We noted that the liquidators have not substantiated this averment. We further do not see the relevance of this allegation. Section 20(1) of the Act entitled 'Ultra vires transactions' reads:

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No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

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[32] The act of the said Tan Cheng Sai in issuing the said 'letters of undertaking' cannot be said to be invalid as far as the first and second respondents and the seventh to the ninth respondents as purchasers are concerned. Based upon the material before the court, the said Tan Cheng Sai would have the capacity or power to act on behalf of the appellant in respect of the transactions.

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[33] We are of the view that the respondents by virtue of the respective sale and purchase agreements and the material before us have proved that they purchased the 20 lots in issue and have given valuable consideration. The respondents have produced receipts issued by the appellant to show that they have paid the 10% deposit required upon execution of the respective agreements. The said 'letters of undertaking' issued by the appellant in respect of the lots identified therein clearly spelt out that the appellant unconditionally agree that it 'will transfer/ assign the above units of property free of any and whatsoever encumbrances/ or claim by us as a total set off against the loan taken from you'. We would agree with the contention of counsel that this is tantamount to an admission by the appellant that they had received valuable consideration from the respondents concerned.

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[34] We cannot see anything erroneous in the decision of the learned judge in granting the orders that the liquidators shall exclude the 20 lots in issue from the list of 'Settlements Units' whereby they proposed or intended to transfer the same to ABMB with the purpose of settling the appellant's debts for the redemption of the bridging loan. We find that the respondents have given valuable consideration and it would be unfair on the part of the liquidators to exclude them from the proposed scheme. The learned judge found that the respondents have acted in good faith in purchasing the respective lots from the appellant and hence are bona fide purchasers. We see no reason to differ from that finding. We would also agree with his finding that s 293 of the Act pertaining to fraudulent preference and s 52 of Bankruptcy Act 1967 are not applicable under the circumstances of this case.

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[35] On the whole, we find that the sale and purchase agreements entered into between the respondents as purchasers and the appellant as vendor are valid transactions. These agreements were never disputed by the appellant prior to it being wound up. Each agreement was properly stamped and witnessed and attested to by solicitors. There is nothing to show that the respondents have not acted in good faith. In *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 204, Chong Siew Fai J (as he then was) in dealing with s 52 of the Bankruptcy Act 1967 said (at p 266):

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Under the said s 52(1), the onus of proof of the lack of good faith and the lack of valuable consideration is on the Official Assignee: *Official Assignee of the Estate of Cheah Soo Tuan v Khoo Saw Cheow* [1931] 2 MC 126 (PC), [1931] AC 67; *Re Anson Cycle & Motor Works, ex parte the Official Assignee* [1960] MLJ 171.

The word 'purchaser' is to be construed in the ordinary commercial sense and means a person who has given value (*Hance v Harding* (1888) 20 QBD 732). In order to constitute 'a purchaser in good faith' within the meaning of the section, it is sufficient if the purchaser acts in good faith, and it is not necessary that both parties to the transaction should so act (*MacKintosh v Pogose* [1895] 1 Ch 505).

[36] As it is the liquidators' position that the 20 lots in issue are the subject of sale and purchase agreements the status and validity of which are uncertain, in the light of the above decision, it is for the liquidators to have the same be set aside or have them declared null and void. This, the liquidators have failed to do so. We would agree with the contention of counsel for the respondents that so long as the respondents acted in good faith, there is no requirement for the respondents to ensure that the appellant should so act. The liquidators have not shown that the respondents are not purchasers in good faith or that the transactions were entered into without valuable consideration on the part of the respondents as purchasers and as such simply cannot confiscate their rights as unsecured creditors. The burden of proof as required by s 52 of the Bankruptcy Act 1967 rests with the liquidators. We are of the view that the liquidators have failed to prove that the transactions were invalid.

[37] For the above reasons, we dismissed this appeal with costs and ordered that the deposit be paid towards the account of taxed costs.

[38] My learned brothers, Mokhtar Sidin JCA and Abdul Wahab Patail J have read the draft and had expressed their agreement thereto.

Appeal dismissed with costs.

Reported by John Paul Simon

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